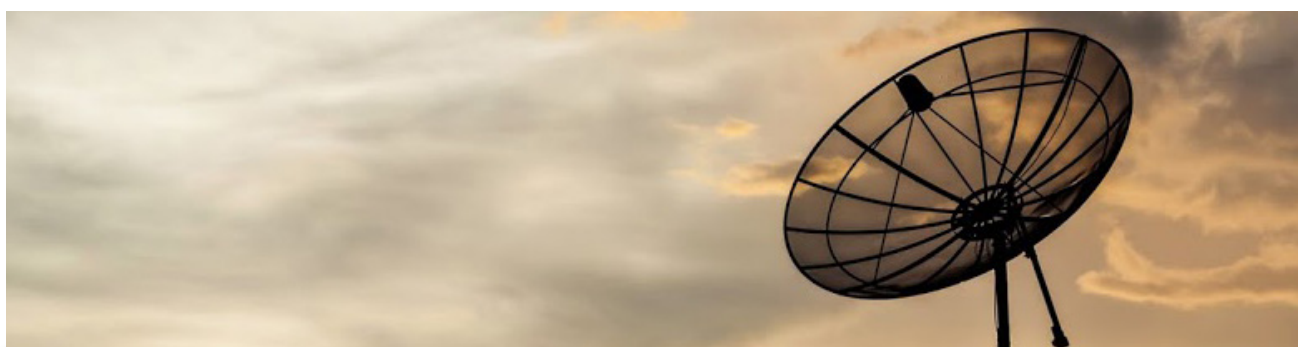




STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM FOR SUSTAINABLE DEVELOPMENT



To Fuse or Not To Fuse? Assessing the Case for Convergent Disciplines on Goods and Services Trade

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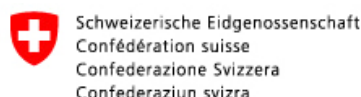
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ABSTRACT

With the rise of global value chains (GVCs) and the growing prominence of services as both facilitators or very objects of supply chain dynamics, it has become commonplace for goods and services to be supplied as a bundled offering within enterprise networks. Separated (politically) at birth since the launch of the Uruguay Round of multilateral negotiations that saw services placed for the first time on the world trade agenda, the goods and services divide reflected in today's structure of global trade governance has increasingly come into question. The fact that goods and services are increasingly supplied together and that the manufacturing process itself offers evidence of ever-heightened co-mingling of goods and services production (for example, contract-based manufacturing; automobile or aircraft financing, and so on) begs the question of the desirability and political economy feasibility of pursuing economies of scale in global rule-making by fusing the law of goods and services trade into one undifferentiated whole.

This essay explores this case for fusing the law of goods with that of services in a world of trade in tasks and production fragmentation. It does so by directing attention to the questions of whether the current architectures of multilateral and preferential trade governance are compatible with a world of trade in tasks; whether the existing rules offer globally active firms a coherent structure for doing business in a predictable environment; whether it is feasible to redesign the structure and content of existing trade rules to align them to the reality of production fragmentation; and what steps can be envisaged to better align policy and realities in the marketplace if the prospects for restructuring appear unfavourable.

The paper argues that fusing trade disciplines for goods and services is neither needed nor feasible and may actually deflect attention from a number of worthwhile policy initiatives where more realistic (if never easily secured) prospects of generic rule-making may well exist. What is needed is not so much rule-making unification between goods and services but rather more holistic negotiating frameworks that embrace the reality of the goods-services nexus in a pragmatic yet pro-active manner. Whether the increasingly diverse and fractured World Trade Organization (WTO) membership is currently capable of any form of policy pro-activeness remains, without doubt, an important open question. Still, examples abound of areas where useful, development-enhancing, synergies between goods and services trade and between trade and investment policy could readily be explored in a manner that would show greater responsiveness and adaptability to the reality of doing business today. Pursuing such synergies would require a commitment to negotiating parallelism with regard to both rule-making and market-opening objectives which has yet to gain currency in the Doha Round context nor been taken up extensively in preferential settings.

CONTENTS

Background	1
Contextual Considerations	1
How Alike are Goods and Services?	2
Distinct Features of Services Trade	2
Needed: Greater Coherence in the Conduct of Negotiations and Exploring the Scope for Horizontal Rule-Making	5
Policy Linkages	5
References	8

LIST OF ABBREVIATIONS

ASCM	Agreement on Subsidies and Countervailing Measures
AoA	Agreement on Agriculture
BITs	bilateral investment treaties
DDA	Doha Development Agenda
EU	European Union
FDI	foreign direct investment
FTAs	free trade agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GVCs	global value chains
IP	intellectual property
IT	information technology
MFN	most favored nation
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PTAs	preferential trade agreements
RTAs	regional trade agreements
SMEs	small and medium-sized enterprises
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TISA	Trade in Services Agreement
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
TTP	Trans-Pacific Partnership
WTO	World Trade Organization

LIST OF TABLES AND BOXES

Table 1:	Key Trade Policy Issues and their Treatment across the Goods-Services Divide
Box 1:	The Trade Negotiating Implications of Servicification: Policy Options

BACKGROUND

With the rise of global value chains (GVCs) and the growing prominence of services as both facilitators or very objects of supply chain dynamics, it has become commonplace for goods and services to be supplied as a bundled offering within enterprise networks. Separated (politically) at birth since the launch of the Uruguay Round of multilateral negotiations that saw services placed for the first time on the world trade agenda, the goods and services divide reflected in today's structure of global trade governance has increasingly come into question. The fact that goods and services are increasingly supplied together and that the manufacturing process itself offers evidence of ever-heightened co-mingling of goods and services production (for example, contract-based manufacturing; automobile or aircraft financing, and so on) begs the question of the desirability and political economy feasibility of pursuing economies of scale in global rule-making by fusing the law of goods and services trade into one undifferentiated whole. As the Swedish National Board of Trade (2013) noted in a recent study:

The role of services both as enablers and tasks in GVCs requires re-examining current trading rules for services (e.g. WTO GATS [World Trade Organization General Agreement on Trade in Services] and services chapters in RTAs [regional trade agreements]). These rules are designed for application to services that are exported as final activities from national firms or service suppliers, and do not reflect the new reality where there are multiple suppliers and multiple locations for services activities, integrated into GVCs that might cross several borders. ... Policy formulation needs to treat goods and services together, and not separately.

This essay explores the case for fusing the law of goods with that of services in a world of trade in tasks and production fragmentation. It does so by directing attention to the following questions.

- (i) Are current architectures of multilateral and preferential trade governance compatible with a world of trade in tasks?
- (ii) Do existing rules offer globally active firms a coherent structure for doing business in a predictable environment?
- (iii) How feasible is it to redesign the structure and content of existing trade rules to align them to the reality of production fragmentation?
- (iv) If prospects for restructuring appear unfavourable, what steps can be envisaged to better align policy and realities in the marketplace?

CONTEXTUAL CONSIDERATIONS

Context usually matters. The division at birth of the General Agreement on Tariffs and Trade (GATT) and the GATS was largely political and ideological—and hence substantively artificial—in nature, rooted as it was in the North-South tensions that permeated the Uruguay Round's launch. Such a divide reflected the prevailing mercantilist approach to agenda expansion, with developing countries resisting the inclusion of issue areas in which their export comparative advantage appeared weak or non-existent. It also reflected the reality of negotiations that started quite literally from a blank page, both empirically and analytically. Not surprisingly, the discovery journey that the GATS negotiations represented was characterized by strong doses of learning by doing and policy precaution, not least on the part of several developed countries that had yet to embrace market-friendly reforms in key service sectors. Confronted with a largely empty canvass, with little to cut and paste from past practice other than the provisions of the GATT, negotiators opted for the safer confines of a separate, self-contained, standalone set of rules, accepting that considerable learning externalities lay ahead of them.

That was then, this is now. A quarter century later, and not least because of vastly improved (if still far from adequate) empirics, it is today possible to more fully appreciate, in the context of globalization's second unbundling (see Baldwin 2011) and the GVC-laden geography of trade and investment that has come in its wake, the dual nature of services as final and intermediate activities of central salience to the development process. Over this period, the export pessimism of developing countries has progressively given way to much greater levels of policy engagement with the sector as a growing number of them, including least developed ones, have come to embrace the information technology (IT) revolution and the scope it affords for supplying services remotely (overcoming what for many is the dual tyranny of geography and market size) and inserting their small and medium-sized enterprises (SMEs) into regional and global value chains.

Autonomous policy has derived unprecedented virtue from a growing recognition of the above realities. This is so even as such developments have, for a variety of tactical and other reasons, garnered significantly less traction at the negotiating table, particularly at the multilateral level. The resulting paradox is a world whose doing business reality and domestic regulatory ecosystems geared towards reaping the benefits of the ongoing services revolution have raced well ahead of

governance structures and rules putatively designed to anchor and help secure such benefits.

The question arises of whether the changes described above are of such a magnitude as to warrant a radical overhaul of the trading system's structure and *modus operandi*. Tempting as this might seem, particularly for those services aficionados frustrated by two decades of negotiating stalemate on the shores of Lake Léman, this paper argues that fusing trade disciplines for goods and services is neither needed nor feasible and may actually deflect attention from a number of worthwhile policy initiatives where more realistic (if never easily secured) prospects of generic rule-making may well exist.

In detailing why and how such a conclusion is derived, the paper starts off counterfactually by pointing first to the considerable diversity of norms governing the various dimensions of trade in goods. The law of goods trade shows at least as much—if not more—divergence and a lack of centralized coherence as that on display under the GATS. Indeed, the alphabet soup of the Agreement on Subsidies and Countervailing Measures (ASCM), Agreement on Agriculture (AoA), Trade-Related Aspects of Intellectual Property Rights (TRIPS), Technical Barriers to Trade (TBT), Sanitary and Phytosanitary (SPS) and Trade-Related Investment Measures (TRIMS) Agreements, while all governing goods trade, are all separate from the GATT, arguably more so than the multiplicity of sectoral annexes under the GATS, all of which are nonetheless anchored to the Agreement's horizontal set of framework disciplines. Has the far-reaching degree of rule-making distinctiveness governing goods trade led to significant incoherence in rule design or implementation? The fact that a call for rule-making fusion is not being voiced on the goods trade side suggests that the answer is firmly in the negative. Moreover, if the case for rule-making fusion between goods and services trade was so compelling, why is it that none of the mega-regional trade agreements currently under negotiation, particularly the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP), proceed on this basis? Their proponents regularly tout their state-of-the-art attributes as enlightened citadels of 21st century trade governance, which are led by trading powers with proven first-mover rule design capacity and highly service-centric economies. Meanwhile, within the more narrow confines of services trade negotiations themselves, the ongoing plurilateral talks towards what is also trumpeted as a cutting-edge Trade in Services Agreement (TISA), divorced as they are from the WTO's trade architecture, can only further entrench the dichotomy between goods and services trade law rather than serve a fusion-enticing purpose.

HOW ALIKE ARE GOODS AND SERVICES?

The fusion of trade law in goods and services can only meaningfully proceed if the substantive remit of trade rules governing each of the two legal instruments is sufficiently proximate as to make lingering differences relatively inconsequential. How close are we to such reality? As it happens, proximity is arguably less than first meets the eye.

The first few years of GATS negotiations, and especially the so-called "sectoral testing" exercise that sought to assess the relevance and applicability of various trade concepts applied to services transactions, revealed a number of important innate characteristics of services trade suggesting the need for rule-making distinctiveness. Several such distinctions bear recalling.

DISTINCT FEATURES OF SERVICES TRADE

Intangibility

First, intangibility and the measurement challenges deriving from that. The relative paucity and significantly lesser degree of sector-specific disaggregated data is a well-known hurdle to credible empirical work in services trade. But this first defining characteristic need not *per se* pose a major obstacle to rule-making fusion so far as services negotiations chiefly concern, in a manner analogous to TBT or SPS negotiations, regulatory measures (laws and regulations) and not border measures (tariffs). Nor do services negotiations lend themselves easily to (quantity-based) formulaic approaches to market opening. The measurement problems stemming from the intangible nature of services transactions do, however, hamper the development and use of the credible metrics required for implementing emergency safeguard measures for services (that is, quantifying injury and establishing beyond reasonable doubt that causality exists between a measurable import surge and the resulting injury to domestic producers), determining the origin of services embedded in goods, and for calculating subsidy margins for purposes of contingent protection determinations. In all three respects, extending the GATT law to services would likely run into crippling problems of empirical determination.

Non-storability, a Multiplicity of Modes, and the Need for Factor Movement

Non-storability, the multiplicity of modes of supplying services, and the inherent need for factor movement

(capital and labor) in services trade and their complex (and complicating) political economies come next. Early Uruguay Round discussions on services witnessed several (recalcitrant) developing countries arguing in favor of a GATT-like definition of trade in services, limiting the remit of a future GATS solely to cross-border supply (Mode 1 trade). Had such an approach been taken, the GATS would have covered less than a quarter of world services trade and ignored three modes of supply—consumption abroad (for example, tourism, health, education); commercial presence (foreign direct investment [FDI] in services); and the movement of natural persons (for example, the supply of professional and other business services), whose combined impact on development and value chain insertion are today widely considered of vital importance to developing country export prospects. While trade in services cannot meaningfully be envisaged in the absence of parallel factor flows, such is not the case for goods trade, where trade and investment have traditionally been separate in treaty terms. Quite apart that there currently exists no multilateral set of investment disciplines to draw from, fusing the law of the GATT and GATS would imply first an acceptance on the part of the WTO membership of the need for a global mandate on investment extending to both goods and services, and a subsequent incorporation of GATS Mode 3 disciplines and commitments into a new generic WTO investment instrument. While the case for revisiting the role of investment, particularly FDI, in trade governance appears decisively stronger in a GVC world, a reality that preferential trade agreements (PTAs) have acted on since the North American Free Trade Agreement (NAFTA) was concluded in the mid-1990s (without, however, fusing goods and services trade law *per se*), crafting a generic set of investment disciplines in the WTO would confront Members with the delicate challenge of re-opening Mode 3 commitments and revisiting the delicate balance of market access benefits woven into the GATS and the WTO more broadly. Still, as is argued below, such efforts are worthy of focused attention in negotiating circles.

Contrasting political economies of non-discrimination

Absent border protection in the form of tariffs, domestic regulation forms the sole currency of services negotiations and the source of discriminatory or market access-impeding conduct. This reality, to which the high(er) incidence of regulatory intervention present in services markets needs to be added, singularly complicates the quest for making national treatment a GATT-like general obligation from which derogations are generally prohibited (other than those relating to the creation of PTAs). In both the GATS, where national treatment applies *à la carte* in the form of scheduled commitments, or in negative list PTAs, where national treatment derogations of variable scope (from specific measures to entire sectors in the manner of unbound measures under the GATS) are made possible through reservations lists, the principle of national treatment is far more relative than absolute. As regards most favored nation (MFN) treatment, the trading system's other bedrock

principle of non-discrimination, political economy factors once more explain differentiated treatment, as between the GATT and GATS. While the MFN principle is, unlike national treatment, a general obligation under both legal orders, in services trade, owing once more to far more acute sectoral interests (reflected in private or bureaucratic rent-seeking conduct), the principle applies in a more flexible manner by allowing derogations to be lodged. To date, close to 600 MFN-inconsistent measures have been notified under the GATS Article II list of exemptions, and PTAs covering services are similarly dotted with such reserved measures, particularly in developed countries with longer traditions of complex sectoral regulation and more deeply entrenched forms of rent-seeking.

High prevalence of quantity-based restrictions to trade and investment in services

Prohibited by definition—a *per se* offense—under the GATT, quantitative restrictions are pervasively used to limit the quantum of competition in services markets and are thus permissible. But they are somewhat confusingly codified under provisions (GATS Article XVI) that cover both quantitative and qualitative, as well as discriminatory and non-discriminatory measures—under the GATS and in PTAs covering services trade and investment. There seems little scope here for legal reconciliation.

High incidence of market failure and regulatory intensity of services trade

The negotiating agenda in services is fully akin to non-tariff discussions in goods trade, but with the important caveat that powerful sectoral regulators in services (mostly from Organisation for Economic Co-operation and Development [OECD] countries) have put up strong resistance to the idea of embedding into the GATS or in the services chapters of PTAs TBT- or SPS-like disciplines on necessity and proportionality for services trade. Accordingly, there are no credible means other than through weaker nullification and impairment grounds to challenge (under the GATS or PTAs) non-discriminatory regulatory measures that may be unduly burdensome or act as disguised restrictions to trade in services. A quarter century of protracted discussions of these matters within the GATS Working Group on Domestic Regulation, mirrored in PTAs, offers decidedly tepid solace to trade law fusion supporters.

High degree of sectoral specificity

This imparts strong doses of verticality to the GATS construct. These are needed both to assuage a multiplicity of powerful sectoral ministries and regulatory bodies involved in regulatory governance and to respond to genuinely distinct sectoral challenges in market opening and underlying regulation. Services negotiations have made clear, both multilaterally and preferentially, that a GATT-like, one-size-fits-all approach to trade governance commands little political or analytical appeal.

Unfinished rule-making agenda

The rule-making agenda of the GATS (and of PTAs) remains unfinished, connoting an underlying preference for rule-making abstinence. Deprived of sufficient time (offering further evidence of the Uruguay Round's blank page syndrome), negotiators carried forward discussions across a large and substantively daunting set of unfinished rule-making business. This concerned the four "leftover" issues of emergency safeguards, subsidy disciplines, government procurement, and the development of disciplines on necessity in domestic service sector regulation. With the exception of government procurement, where far-reaching Agreement on Government Procurement- (GPA) plus market-opening can be found, all of the above areas of services rule-making have also floundered within preferential confines. Once more, such repeat failure—and the underlying regulatory preference it clearly connotes—would appear suggestive of a difficult fusion journey.

Undesirability of extending trade remedy disciplines to services trade

A fusion of the GATT and the GATS would imply that contingent protection measures—and the generally weak multilateral disciplines governing their use—would extend to services. Doing so commands generally low appeal among most observers, not least because the history of anti-dumping has generally not been a happy one when looked at through the lens of economic efficiency, even as such instruments of protection typically command widespread appeal in industry circles. There is little doubt, for instance, that European and American airlines would seek dumping or countervailing duty investigations against carriers in the Gulf region accused of a combination of state-supported unfair trading practices. Quite apart from the paradoxical fact that it was these very airlines—and the governments beholden to them—that conspired to exclude the bulk of civil aviation from the ambit of modern services tradecraft, it is far from certain that consumer welfare would be well served through such action. A further paradox

TABLE 1:

Key Trade Policy Issues and their Treatment across the Goods-Services Divide

Issue	Goods	Services
National treatment	General obligation under GATT Art. III	<i>A la carte</i> under GATS Art. XVII; absent tariffs/border protection. A general obligation under negative list PTAs subject to measure- or sector-specific derogating reservations.
Quantitative restrictions	Per se offense under GATT Art. XI	Fully permissible but subject to scheduling under GATS Art. XVI. Identical treatment in PTAs.
MFN	General obligation under GATT Art. I	General obligation under GATS Art. II but subject to listing derogations under Annex II (500+ MFN-inconsistent measures have been notified). Identical treatment under PTAs.
Necessity/proportionality	Subject to TBT/SPS disciplines; large body of GATT jurisprudence	Unfinished agenda under GATS Art. VI; weaker nullification and impairment disciplines, and strong resistance from regulatory communities, especially in OECD countries. Identical treatment under PTAs.
Subsidy disciplines	Subject to ASCM and AoG	Unfinished agenda under GATS Art. XV (clear revealed preference for regulatory inaction). Identical treatment under PTAs.
Emergency safeguard measures	Subject to GATT Art. XIX	Unfinished agenda under GATS Art. X (clear revealed preference for regulatory inaction). Legitimate doubts expressed over the feasibility and desirability of embedding GATT-type disciplines to services trade given data limitations and the multiplicity of modes of supplying services. Identical treatment in PTAs.
TRIMs	Covered	Service sector TRIMs are not addressed in the WTO but covered in bilateral investment treaties (BITs) and in the investment chapters of PTAs. No disciplines on forced localization though local presence disciplines in several PTAs could be of relevance as a potential discipline.
Trade remedies	Covered	Not addressed
TRIPS	Covered	Not addressed
Digital trade	Coverage limited to the Ministerial commitment on duty-free exchanges of digital products.	No coverage under the GATS but provisions on digital trade embedded in the services rules of an increasing number of PTAs.

lies in the negotiating paralysis and clearly revealed preference for regulatory inaction flowing from a quarter century of fruitless WTO discussions on subsidy disciplines for services (see Sauvé and Marta Soprana 2015) or the development of emergency safeguard measures analogous to those obtaining under GATT Article 18.

Table 1 below offers a summary of key distinctions between goods and services and their differentiated treatment under trade law. The conclusion that can be drawn from the discussion so far is that the case for rule-making fusion appears weak on both political economy and technical feasibility grounds. Moreover, just because goods and services are more closely intertwined in a world of production fragmentation does not in itself justify the need for unified global rules. This may be so because GVCs are, more often than not, regional rather than global in character (Estevadeordal et al. 2013). The burgeoning empirical literature on GVCs tends to show that Friedman's proclaimed end of geography (2005) is as unlikely as Fukuyama's end of history (1992) has been shown to be. A crucial element of rule-making subsidiarity appears at play here, with PTAs responding to the predominantly regional fragmentation of production networks by operating the most important fusion—that between trade and investment, and, in the case of those agreements featuring comprehensive investment norms, doing so in a manner that straddles the goods and services divide.

NEEDED: GREATER COHERENCE IN THE CONDUCT OF NEGOTIATIONS AND EXPLORING THE SCOPE FOR HORIZONTAL RULE-MAKING

What is needed—and likely more feasible—is not so much rule-making unification between goods and services but rather more holistic negotiating frameworks that embrace the reality of the goods-services nexus in a pragmatic yet pro-active manner. Whether the increasingly diverse and fractured WTO membership is currently capable of any form of policy pro-activeness remains, without doubt, an

important open question. Still, examples abound of areas where useful, development-enhancing, synergies between goods and services trade and between trade and investment policy could readily be explored in a manner that would show greater responsiveness and adaptability to the reality of doing business today. Pursuing such synergies would require a commitment to negotiating parallelism with regard to both rule-making and market-opening objectives which has yet to gain currency in the Doha Round context nor been taken up extensively in preferential settings. Three such examples come to mind.

- (i) Complementing the ongoing negotiations under the GATT's Information Technology Agreement (the so-called ITA-II talks) with a cluster of closely aligned information and communications technology (ICT) services components under the GATS (see Makiyama 2011).
- (ii) Completing the Bali Ministerial mandate on trade facilitation (pursued rather narrowly under the GATT) with the logistics-transport-border management cluster of services best able to give lasting commercial meaning to the facilitation of trade.
- (iii) Exploring the nexus between environmental goods and services, where development-enhancing synergies would appear entirely feasible and within reach to all but tunnel vision-challenged trade negotiators (see National Board of Trade 2014).

Beyond efforts at promoting complimentary forms of negotiating parallelism between the GATT and GATS, all of which are rooted in negotiations currently under way, several new rule-making fronts offer genuine prospects for forward-looking evolutionary changes in multilateral trade governance. Box 1 offers a quick glance at some of the policy options available to negotiators seeking to move the trading system in the direction of greater GVC responsiveness.

POLICY LINKAGES

Pursuing some of the policy linkages discussed below appears not only feasible today but also largely overdue, not least in light of developments within PTAs. Other such linkages are considerably more contentious and may indeed be viewed as resting on shakier analytical or developmental grounds. Yet all are worthy of evidence-based policy dialogue. Among such policy linkages are the following.

Embedding a comprehensive set of investment norms in the WTO architecture

Such a set of investment norms would cover both goods and services and span the protection and liberalization dimensions of investment rule making. The E15's work on GVCs, pursued across several Expert Groups, has established

beyond reasonable doubt that a strong case exists to revisit the role and place of investment alongside trade in a revamped system of global economic governance. The rising tide of cross-border investment activity, the unrelenting intensification of locational competition, particularly over efficiency-seeking forms of investment, and the quality of regulatory ecosystems to which FDI responds in a world of trade in tasks all require a fresh reappraisal in a trade policy setting. Doing so would allow a constructive dialogue to proceed on the pros and cons of adopting horizontal investment disciplines that would cease to operate artificial distinctions between goods and services. It would also entail, for the sake of coherence, that existing Mode 3 commitments under the GATS migrate into a new generic WTO investment instrument and benefit from the more complete set of protection disciplines available under investment law. Important questions of feasibility would doubtless need to be confronted in attempting such an architectural overhaul, not least on the existing balance of benefits under the GATS and what would remain of it once the most commercially salient mode of supplying services was removed.¹ Is this doable? One need look no further than to the WTO's periphery, where a majority of preferential trade and investment agreements today do just that, limiting services rule making and liberalization to cross-border transactions by fusing Modes 1 (cross-border supply) and 2 (consumption abroad).

Embedding a generic set of multilateral norms on labor mobility

If the investment surgery proposed above could be performed, it would offer the further benefit of freeing Mode 4 trade from its current services shackle and allow the multilateral community to think harder about the pros and cons of a standalone, generic set of disciplines on trade-related labor movement divorced from the goods and services divide. While internationally mobile workers inevitably sell their labor as a service, there is no reason for Mode 4 trade to relate exclusively to service industries. Elevating the importance of enlarged negotiations on labor movement and making it conceptually equal to how investment is treated under trade law would likely allow enlarged, development-enhancing bargains to be struck in areas of key export interest to developing countries. Underlying trends in global demographics and structural supply-demand mismatches in many countries' labor markets (especially those of richer nations) suggest that the scope for enlightened reciprocity is far greater than is currently being pursued or envisaged, including with respect to workers with lower levels of skill. A new path on

¹ The resistance of both national and international bureaucrats and bureaucracies should not be underestimated in this regard given that trade and investment policy are often treated under different agencies or units within governments or international organizations.

BOX 1:

The Trade Negotiating Implications of Servicification: Policy Options

In a recent contribution to its ongoing exploration of the trade policy implications of production fragmentation, the National Board of Trade of Sweden envisaged three possible policy options of relevance to this paper's discussion.

A first option would be to negotiate goods and services together, i.e. a cluster approach. With the exception of the Government Procurement Agreement in the WTO, trade negotiations and agreements keep goods and services well separated from each other. If related services and goods were negotiated together in clusters, it could enable negotiators to address barriers faced by servicified companies in a comprehensive way. An integrated approach has been suggested for several sectors, both within the DDA [Doha Development Agenda] framework and outside. An argument against cluster approaches is that it is difficult to draw the line as to what to include.

A second option would be to negotiate clusters of services only. This could be done without any large changes in the negotiation frameworks. The problem of delimitation would be the same of course. Clusters could be one way to address now rather neglected areas that are important to servicified firms in a structured way. For greater effect, any type of cluster could also be combined with regulatory commitments specific for the sectors, regarding for example competition, TBT-like restrictions, licensing, access to networks and trade facilitation.

A third option would involve a rationalization of services negotiations by agreeing on horizontal benchmarks that would remove certain barriers to Mode 3 and Mode 4 across sectors. Such barriers could for example include local content requirements, demands for joint ventures and economic needs tests for establishment. Similarly, a horizontal approach might yield more business friendly results in Mode 4 as opposed to the current piecemeal approach. As in recent EU FTAs [European Union free trade agreements], all sectors that are opened for establishment should also allow entry of key personnel for operating the new establishment. Similar treatment could be extended to service suppliers without an establishment in the country of delivery, for example in order to deliver training and installation services for products."

Source: National Board of Trade (2012).

labor movement would need to reduce the current bias in negotiated commitments favoring labor movement linked predominantly to cross-border investment activity—hence to the negotiating interests of capital-exporting countries. No one should doubt the scale of resistance that efforts targeting such an overhaul would most assuredly confront given the backlash against illegal or strife-induced migratory pressures and the deeply entrenched propensity in policy circles to equate temporary work-related labor mobility with more permanent forms of migration. Still, the case for enlightened governance responses at the interface of cross-border trade, investment, and labor flows remains strong, including on moral grounds (Rogoff 2015; Pritchett 2006).

Extending TRIMs disciplines to services trade

The anchoring of a comprehensive set of investment disciplines in the WTO would of necessity raise the question, long addressed in a large number of PTAs, of extending disciplines prohibiting various types of trade- (and investment-) distorting performance requirements to services trade. While the case for doing so appears generally weak on development grounds given the pervasiveness of market failure confronting would-be SME GVC suppliers in many developing (and small) country settings, the precedent set by PTAs and the path-dependent manner in which such disciplines have been routinely carried forward suggest a degree of host country complicity (or recurring host country negotiating negligence). Extending the remit of TRIMs disciplines to services trade would offer a potentially attractive disciplinary anchor to industry interests directly concerned by the recent proliferation of forced localization policies and other local presence requirements, particularly in the digital sphere. Debates over forced localization practices inevitably dovetail with matters of data privacy, the regulation of cross-border data flows, and the taxation of transactions in cyber-space. All of these arguably need to command global governance responses that even PTAs have only tepidly begun to supply, and movement on this front will likely prove slow and contentious in the global arena (Miyakama 2014).

Extending TRIPS disciplines to services

The blistering pace of product and process innovation in services has thrown up significant challenges to intellectual property (IP) protection regimes in the sector, ones that are weakly or inadequately addressed by existing global norms. While discussions of IP issues are almost always and everywhere prone to significant policy debate and conflicting public-private interests, there would appear to be no inherently cogent rationale for addressing the trade-related aspects of IP in a segmented manner under the GATT's sole ambit. The case for stringent IP protection in services may, however, display considerable sectoral variance, with the open source logic of less IP stringency in some segments of the digital economy confronting demands for significantly stronger doses of IP protection (for instance, copyrights in creative industries).

Revisiting the trade-investment-competition nexus

Another undeserving Singapore Issue casualty, the interface of trade and competition, which is increasingly viewed as concerning the potentially trade-, investment-, and competition-distorting practices of state-owned enterprises, requires renewed policy dialogue that once more needs to be conceptually divorced from the goods-services divide. The salience of competition law and pro-competitive regulation has long been plain to all those involved in services negotiations, not least because of the large number of service sectors with network properties that continue to display high degrees of market concentration even in the presence of far-reaching market-opening commitments. With globalization inducing pressures for heightened scale, market concentration and the abuse of dominance that may come in its wake, this calls for a complimentary alignment of trade, investment, competition law, and policy on pursuing open markets.

Promoting regulatory coherence

Regulatory simplicity and efficiency are increasingly regarded as important determinants of competitiveness and economy-wide performance. They can also condition the ability of a country—and its firms—to capture various “tasks” in value chains. This is particularly important for SMEs. A critical examination of how to harness WTO law to achieve greater regulatory efficiency will be necessary so that regulations do not impose themselves as needlessly burdensome or protectionist bottlenecks in the value chain creation process. Agreements on regulatory coherence, whether through the adoption of general or sector-specific principles (or a likely combination of both), are seen as increasingly essential in this regard. As Sweden's National Board of Trade (2013) correctly pointed out in a recent study, the quality of institutions is also an important factor in the development of goods and services value chains as it affects the quality and effectiveness of the underlying regulatory environment. This is often critical for attracting efficiency-seeking FDI. At play in a number of the most prominent mega-regional or plurilateral agreements currently under negotiation (TTIP, TPP, TISA), the quest for multilateral disciplines on regulatory coherence is likely to proceed iteratively from the juridical precedents established within the WTO system's periphery. However, a word of caution is warranted on discussions to do with advancing the principles of necessity and proportionality in services trade. While both principles feature prominently under the GATT (in the TBT and SPS Agreements) and should ideally inform any journey aimed at facilitating trade and investment through regulatory temperance, the resistance of vertically powerful service sector regulators (especially in developed countries) has long posed an obstacle to moving forward.

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